

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:

Amendment of the Commission's
Rules To Provide Channel Exclusivity
To Qualified Private Carrier Paging
Systems at 929-930 MHz

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)PR Docket No. 93-35
RM-7986

REPLY COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORPORATION

MOBILE TELECOMMUNICATION
TECHNOLOGIES CORPORATION

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**REPLY COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORPORATION**

Mobile Telecommunication Technologies Corporation ("Mtel") herewith submits its reply to comments in the above-captioned proceeding to establish channel exclusivity for 900 MHz private carrier paging ("PCP") systems.¹ As discussed below, Mtel and the majority of commenters agree that the Commission's proposals must be strengthened to prevent speculation and abuse. In addition, the opening comments underscore the need to ensure that functionally equivalent competing service providers are subject to comparable regulatory conditions. Accordingly, the Commission should promptly initiate proceedings to develop a coherent and integrated approach to private and common carrier paging regulation.

I. SUMMARY

Mtel and others have expressed concern that the Notice's reliance upon a transmitter-based standard for establishment of channel exclusivity will lead to speculation, warehousing and other all too familiar abuses. In short, "[g]ames can and would be played with such a limited approach."²

¹ *Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz*, FCC 93-101, rel. March 31, 1993 ("Notice").

² See Comments of Mtel at 2 (filed May 6, 1993).

To safeguard against the potentially detrimental consequences of trafficking in spectrum rights,

Mtel has recommended the following modifications:

- Transmitters counted toward the exclusivity standard must be part of an integrated, operational system providing service to the public. This modification would help to ensure that licensees deliver true nationwide service.
- Licensees should be expected to certify, through submission of a sworn affidavit, that they serve a reasonable, minimum number of subscribers before exclusivity is attained.
- Licensees should be required to construct nationwide systems consistent with strict build-out schedules provided to the Commission. The proposed "slow growth" construction period provides speculators and spectrum warehousers with an opportunity to hoard valuable frequency rights without fulfilling their corresponding obligations as nationwide service providers.
- Licensees should be required to serve a minimum of 150 markets with at least one market in each state. In this regard, the Commission must clearly define "market" and "service" to a market.
- For nationwide systems, a licensee should not be deemed to serve a market unless its signal covers 75% of the market. Such a standard will ensure that real service is provided to a substantial population of subscribers or geographic area.
- Existing licensees should receive greater protection than the Notice's grandfathering provisions provide.
- More than one exclusive channel should not be awarded to a commonly owned licensee until its exclusive channel(s) meet(s) minimum loading requirements. This modification accomplishes two goals -- it allows bona fide applicants meeting the minimum subscriber threshold to expand service while discouraging speculators and spectrum hoarders.

These strengthened standards are also necessary to combat potential problems arising from the formation of paging "systems" by groups of existing licensees. The Commission must take great care to prevent insincere applicants, with little or no effort or expenditure, from freezing a frequency and limiting competitive opportunities. Finally, Mtel reiterates the importance of a

balanced approach towards the future regulation of paging. Functionally equivalent paging operators must be afforded similar treatment if competition in the paging marketplace is to thrive.

**II. MTEL'S OPENING COMMENTS IDENTIFIED AREAS WHERE
THE COMMISSION'S PROPOSALS MUST BE STRENGTHENED
TO PREVENT WAREHOUSING AND SPECULATION**

Mtel's opening comments pointed out several vagaries and insufficiencies of the Commission's proposals for exclusivity standards. In this regard, Mtel's overarching position is that the Commission should demand that PCP operators "earn" exclusivity and not profit through mere speculation or potentially meaningless promises to construct vast paging networks. Mtel therefore recommended that the Commission require paging transmitters counting towards exclusivity to be part of an integrated, operational system providing service to the public.³ Otherwise, the proposals will impel PCP operators to apply for transmitters with the sole intent of satisfying the government-imposed exclusivity benchmark. In short, the idea of providing communications services to the public will play second fiddle to the business realities of securing exclusivity and limiting competitive entry opportunities.

In addition, Mtel cautioned that the proposed standards for securing national PCP exclusivity rights were not commensurate with the rights and privileges afforded to national licensees. For example, Mtel explained that spectrum hoarding or warehousing may result if exclusivity is based upon the number of transmitters -- proposed or constructed. In its comments, Mtel suggested that the Commission should require operators seeking exclusivity to attest to serving a minimum number of subscribers.⁴

³ Mtel Comments at 6.

⁴ *Id.* at 7.

Mtel also took issue with the Notice's proposals on the number of markets that PCP operators would need to serve in order to qualify for national exclusivity as well as the required geographic dispersion of those markets.⁵ It was Mtel's contention that the requirement to have transmitters in at least 50 markets, including at least 25 of the top 50 markets, and to serve at least two markets in each of the seven RBOC regions, is inadequate to ensure that PCP operators will provide nationwide service. Mtel believes that the Commission should increase each of these benchmarks. For instance, Mtel believes that national licensees should be required to serve at least 150 markets, including each of the top 100 markets. In addition, rather than specifying geographical diversity by the seven RBOC regions, the Commission should require that national PCP licensees serve markets in each state -- at a minimum, one market in each state. Such standards will better serve the public interest by minimizing the egregious preclusive effects of national PCP licenses.⁶

Perhaps more relevant, however, Mtel urged the Commission to require PCP operators to achieve a minimum level of service coverage across a "market" before including that market in its justification for national exclusivity. PCP operators should do more than establish a presence in a market before gaining the ability to preclude others from using a particular frequency in that market. Rather, operators should be required to serve that market. In its comments, Mtel suggested that PCP operators be required to verify that their transmitters cover at least 75 percent

⁵ Mtel at 8.

⁶ In addition, Mtel stated that the Commission needs to be more precise in its definition of the term "market." Otherwise, the FCC will become embroiled in disputes such as whether suburban markets are distinct or non-segregable from their big city neighbors.

of either the geographical area or the population of a market before including that market in its justification for national exclusivity.⁷

A number of commenters agree that the Notice's proposals must be bolstered to protect against speculation and inappropriate gamesmanship, offering persuasive arguments for stiffened geographic distribution requirements. PageMart, Inc. ("PageMart") argues that operators should be required to serve at least five markets in each RBOC region before being granted nationwide exclusivity. The current proposal, it fears, is too low to provide adequate protection against speculation as "a PCP operator could concentrate construction of its transmitters on the two coasts, with only nominal investment elsewhere, and yet could still easily meet the proposed standard, tying up the channel(s) nationwide without providing truly nationwide service."⁸

PageNet envisions a similarly inefficient scenario:

"[A] licensee jockeying for nationwide exclusivity could construct 300 transmitters in the northeast and claim exclusivity nationwide. Its stake in this frequency would then preclude carriers who legitimately want to serve the southwest, for example, from using these channels. As a result, consumers would be denied truly nationwide service, valuable spectrum would be fallow, and the northeast carrier could choose whether to build out this year, in ten years, or not at all."⁹

The Commission should not allow such speculation, warehousing and other familiar abuses to take place. Accordingly, it should modify the Notice's proposals, consistent with the recommendations detailed above, to safeguard against the detrimental consequences of trafficking in spectrum rights.

⁷ *Id.* at 9.

⁸ PageMart at 14.

⁹ PageNet at 11-12.

III. THE COMMENTS OF INTERESTED PARTIES HIGHLIGHT A NUMBER OF AREAS WHERE POTENTIAL ABUSES OR PROBLEMS COULD ARISE ABSENT COMMISSION MODIFICATIONS TO THE NOTICE'S PROPOSALS

A. Without Greater Protections, The Formation Of Paging "Systems" By Groups Of Existing Licensees Could Lead To Abuses

The Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("NABER") characterizes the Notice's proposal to allow only individual licensees to achieve channel exclusivity as an oversight. It urges the Commission to address the issue of aggregate exclusivity and to expressly allow existing PCP co-channel licensees to achieve channel exclusivity on an aggregate basis. As such, two licensees with a combined number of six contiguous transmitters authorized on a co-channel basis would be protected from future applicants as if each had individually achieved exclusivity of the channel.¹⁰

Such an adaptation of the Notice would potentially preclude new entrants in virtually every market across the country. Mtel has serious concerns that such an approach would stifle competition and encourage spectrum warehousing. Accordingly, Mtel urges the Commission to carefully review its database before incorporating NABER's proposal.

PacTel Paging ("PacTel") also takes issue with the Notice's failure to adopt NABER's

proposal to allow several licensees to cooperate together and achieve exclusivity in a territory."

to freeze a frequency. These and other comments underscore the need for more stringent channel exclusivity requirements.

**B. Strong Performance Bonds Are Needed To Prevent
Abuse Of The Slow-Growth Provisions**

In conjunction with its slow-growth proposal, the Notice requested comment on the feasibility of using performance bonds as an alternative to a showing of financial ability.¹² With a performance bond, a bank undertakes to pay a beneficiary -- in this case, the FCC -- a guaranteed amount in the event the licensee has not met or insufficiently fulfilled its obligation to construct transmitters in accordance with the Commission's slow-growth construction schedule. Mtel submits that performance bonds are not only feasible, they are a necessary component of the Commission's 900 MHz channel exclusivity plan. Indeed, the Commission has recently proposed to utilize performance bonds to justify similar grants of licenses for national or wide-area spectrum rights.¹³ The case for doing so is no less compelling here.

Despite its tentative conclusion that its benchmark approach to regional and nationwide licensees would, "in all likelihood, assure that the applicant carries out its commitment to construct and or operate the system," the Commission proposed "an alternative that may better achieve this end."¹⁴ As such, the Commission proposed to require nationwide and regional applicants to

¹² Notice at n. 47.

¹³ *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted the Specialized Mobile Radio Pool*, FCC 93-34, rel. Feb. 12, 1993 ("900 MHz SMR"); "Commission Puts Forth Proposals To Facilitate Future Development of SMR Systems In The 800 MHz Frequency Band," FCC News Release, May 13, 1993.

¹⁴ 900 MHz SMR at ¶ 40.

"obtain a performance bond in the amount of \$50,000 for each base station facility, or a total of \$3.5 million for a nationwide system."¹⁵ While an applicant would progressively be refunded a portion of the bond upon complete construction of each base station pursuant to its construction schedule, failure of an applicant to timely construct would trigger automatic cancellation of the nationwide or regional license and forfeiture of the bond's remainder.

The Commission should adopt a similar approach in this proceeding. A clearly defined, precise performance bond "would serve as an incentive to the [slow-growth applicant] to make productive use of the spectrum resource, and, in the event the licensee fails to timely construct, the performance bond serves as a mechanism whereby the public is compensated for the spectrum being encumbered in a way that is not beneficial."¹⁶ Mtel recommends that performance bonds be set at \$25,000 for each base station and \$7.5 million for a nationwide system. Such figures would provide a physical demonstration of the slow-growth applicant's ability and intent to build out the system and a significant penalty for failure to construct the system as proposed, thereby lessening the chance that valuable nationwide licenses would be granted to casual applicants offering meaningless promises to construct vast paging networks. The Commission cannot afford to tolerate or condone speculation. Accordingly, strong performance bonds must be added to the Commission's slow-growth proposal.

¹⁵ *Id.*

¹⁶ *Id.* Mtel does not believe that NABER's proposal to base the performance bond "upon the maximum monetary forfeiture that the Commission could impose for either misrepresentation/lack candor or miscellaneous violations" would sufficiently accomplish this objective. NABER at 14.

IV. THE COMMISSION SHOULD PROMPTLY INITIATE PROCEEDINGS TO ENSURE REGULATORY PARITY BETWEEN PCPS AND RCCS

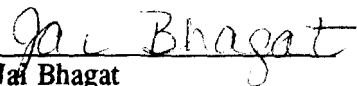
There is a recognition among commenters that adoption of the Notice's proposals will further erode the functional distinctions between PCPs and RCCs. As McCaw notes, "if the proposals in this proceeding and in PR Docket 93-38 are implemented, the carrier providing 900 MHz paging service will be transparent to the end user for all intents and purposes."¹⁷ Yet these

consistent with legislative proposals for regulatory parity pending before Congress. Accordingly, "the Commission must take 'a hard look at the salient problems,' and thereafter treat similarly situated licensees in the same manner."²¹

V. CONCLUSION

For the reasons detailed above, Mtel believes that the Commission's proposal for 900 MHz PCP channel exclusivity cannot depend wholly on a transmitter-based standard to ward off the inevitable incentives for speculation, warehousing and other potential abuses. The Commission must strengthen its standards to ensure access to true nationwide service. In addition, the Commission should initiate efforts to ensure regulatory parity for functionally similar private and common carrier paging regulation.

Respectfully submitted,


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Dated: May 21, 1993

²¹ BellSouth at 5.